No. 75-1185

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANKLIN L. McNULTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner's sole contention is that he was improperly convicted of willfully attempting to evade his income tax on Irish Sweepstakes winnings, because he voluntarily disclosed the winnings to representatives of the Internal Revenue Service.

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully attempting to evade and defeat the assessment of his 1973 income tax, in violation of 26 U.S.C. 7201. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. i-iv).

The pertinent facts are as follows: Early in 1973, petitioner won $130,000 in the Irish Sweepstakes (Pet. App. ii). When he learned of his good fortune he stated to a friend that he was not going to tell anyone because

he "wasn't going to pay income tax" (Tr. 30).[1] However, the next day the local newspaper reported that petitioner was a major winner of the Sweepstakes (Tr. 31), and that evening there was a television broadcast to the same effect. Petitioner then consulted representatives of the Internal Revenue Service about his winnings; they advised him that they were taxable even if not brought into the United States (Tr. 20-23, 55; Pet. App. ii). These conversations took place about a year before petitioner's 1973 income tax return was due to be filed. There was no evidence that petitioner identified himself to these employees of the Internal Revenue Service.

In May 1973, petitioner went to Ireland, picked up his winnings, and then stopped at St. Helier, Isle of Jersey, Channel Islands, where he deposited approximately $125,000 in a bank (Pet. App. ii). At that time, petitioner knew that the Channel Islands had strict laws forbidding disclosure of deposits made by citizens of the United States and that those laws forbade disclosure even to the Internal Revenue Service (*ibid.*). Petitioner filed no federal income tax return for 1973, nor did he pay any part of his income tax liability for that year (Tr. 25-28).

Petitioner argues (Pet. 8-11) that he could not have committed an affirmative act of attempted tax evasion because he had already apprised representatives of the Internal Revenue Service of his winnings. But there is no evidence that petitioner identified himself to the Service representatives. Moreover, the conversations in question took place about a year before the 1973 tax return was even due to be filed, and with representatives whose sole duty was to answer questions submitted

[1] "Tr." refers to the trial transcript.

by the public. Indeed, the Service representatives told petitioner that his winnings were taxable, a fact that demonstrates petitioner's willfulness. Finally, even if petitioner had identified himself to revenue agents and told them that he had won the Sweepstakes, these disclosures would not be proof of a subsequent innocent state of mind when petitioner deposited his winnings in a secret bank account in the Channel Islands and failed to file a tax return.

Contrary to petitioner's argument (Pet. 8-9, 11), the decision below does not conflict with *Spies* v. *United States,* 317 U.S. 492. In *Spies* the Court stated: "By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from * * * concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal" (317 U.S. at 499). It is apparent that petitioner's conduct in depositing his winnings in the bank at St. Helier in the Channel Islands was not only conduct the likely effect of which was to conceal, but amounted to "concealment of assets or covering up sources of income"—precisely the type of conduct from which this Court said an affirmative willful attempt to evade a tax might be inferred. Far from being in conflict with *Spies,* the case at bar is in full harmony with it, and indeed is governed by it. Although the vast majority of violations of 26 U.S.C. 7201 are committed by filing false returns, the language of the statute (which proscribes tax evasion "in any manner") is clearly broad enough to include other acts committed for the purpose of concealing unreported income. *United States* v. *Beacon Brass Co.* 344 U.S. 43, 45-46.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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